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THE METAPHOR IS THE MESSAGE: VISUALITY, AURALITY AND THE RECONFIGURATION OF AMERICAN LEGAL DISCOURSE

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For good or ill, legal language is strongly metaphorical. Largely because law itself is such an abstract and intellectually-indeterminate idea, we are continually driven to describe it in figurative words and phrases that evoke concrete and readily-comprehensible sensory phenomena.

Of course, legal metaphors can and do embrace the entire sensory spectrum: they can and do evoke phenomena seen, heard, felt, smelled or even tasted. Most of the metaphors common in traditional American legal discourse have nonetheless had a visual connotation. We frequently speak of law as a matter of looking: we "observe" it; our high courts "review" the decisions of inferior tribunals. Alternatively, we speak of law as something one would usually look at: it is a "body," a "text," a "bulwark of freedom," or a "seamless web." We identify particular legal concepts with striking visual images: property rights are a "bundle of sticks," a long-standing constitutional principle is a "fixed star." We describe legal reasoning as the manipulation of visible geometric forms: we try to "square" precedents with one another; we agonize over "where the line can be drawn." We discuss legality in terms of light and darkness: we look for "bright-line" distinctions; we probe the shadowy "penumbras" of well-known constitutional guarantees. With the aid of metaphor, we go so far as to give law the visual quality of hue: we may make a property claim under "colour of title"; we make securities trading subject to "blue-sky" laws. [1]

This visual language has become too well-entrenched and is too con-

[1] For citations to specific uses of these familiar legal metaphors, see B.J. Hibbitts, "Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse", *Cardozo Law Review* 16/4 (1994), 229-356, of which this is an abridged, modified and minimally-annotated version.

venient to be abandoned, but in recent years a growing number of American legal scholars (if not yet many judges or practitioners) have cast some of their best writing in metaphors that evoke aural expression or experience. Most of these individuals subscribe to a broadly "critical" legal philosophy; many are exponents of distinctively feminist, African-American, Hispanic or Jewish approaches to jurisprudence. Their work characterizes law as a matter of "voice"[2] — a figurative "speaking" that liberates persons from the injustices of "silence" while demanding fairness in the form of "listening."[3] The new legal literature variously describes law, rights, legal reasoning, legal language, the judicial process and judicial decisions as so many forms of "rhetoric,"[4] "talk,"[5] "dialogue,"[6] "conversation,"[7] "storytelling"[8] and "parable."[9] Some legal

2 See, e.g., R. Delgado, "When a Story is Just a Story: Does Voice Really Matter?", *Virginia Law Review* 76/1 (1990), 95-111; J.G. Getman, "Voices", *Texas Law Review* 66/3 (1988), 577-588; B. Ramsey, "Excluded Voices: Realities in Law and Law Reform", *University of Miami Law Review* 42/1 (1987), 1-5.

3 See, e.g., L.M. Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning", *Notre Dame Law Review* 64/5 (1989), 886-910; J.M. O'Fallon and C.C. Ryan, "Finding a Voice, Giving an Ear: Reflections of Masters/Slaves, Men/Women", *Georgia Law Review* 24/4 (1990), 883-907.

4 See, e.g., W.C. Durham Jr., "Rhetorical Resonance and Constitutional Vision", *Cardozo Law Review* 14/3-4 (1993), 893-906; J.B. White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life", *University of Chicago Law Review* 52/3 (1985), 684-702.

5 See, e.g., M.A. Glendon, *Rights Talk* (New York: Free Press, 1991); P.A. LeBel, "Rights-Talk and Torts-Talk: A Commentary on the Road Not Taken in the Intellectual History of Tort Law", *Case Western Reserve Law Review* 41/3 (1991), 811-821.

6 See, e.g., A.V. Alfieri, "The Antimonies of Poverty Law and a Theory of Dialogic Empowerment", *New York University Review of Law & Social Change* 16/4 (1987-88), 659-712; B. Friedman, "Dialogue and Judicial Review", *Michigan Law Review* 91/4 (1993), 577-682.

7 See, e.g., T.G. Phelps, "The New Legal Rhetoric", *Southwestern Law Journal* 40/4 (1986), 1089-1102; E.M. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement", *New York University Law Review* 61/4 (1986), 589-652.

8 See, e.g., T. Massuro, "Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?", *Michigan Law Review* 87/8 (1989), 2099-2127; S.C. McKenzie, "Storytelling: A Different Voice for Legal Education",

scholars have gone so far as to describe legal pluralism as "polyphony."[10]

This jurisprudential turn from metaphoric visuality towards a measure of metaphoric aurality is no passing semantic fad. Rather, I think it represents a significant (if still nascent) reconfiguration of American legal discourse rooted in changing cultural, sociological and phenomenological conditions. In the next three sections of this article I will examine these conditions in turn.

American Legal Metaphor in Cultural Context

American culture has, and has long had, a visual bias. It has been said that "[i]n our society, ... to be real, a thing must be visible."[11] Every time we sing the first line of the national anthem, we ask a question about looking: "Oh say can you see ... ?". Our idea of beauty, even of art (usually identified with painting), is primarily and fundamentally visual. We go on vacation not to hear the sounds, but to "see the sights." We differentiate ourselves and unfortunately discriminate against each other on the basis of our visible characteristics, especially the colour of our skin: most Americans are considered "white" or "black." We routinely rely on visual metaphors to communicate the central intellectual operations of understanding and knowing. When we comprehend something, we say "I see"; someone who doesn't understand lacks "insight" or is "blind" to the obvious.

American law has both reflected and actively contributed to our overall cultural visuality. Even in American trial courts which resound with the voices of lawyers, litigants, judges and jurors, great effort goes

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University of Kansas Law Review 41/2 (1992), 251-269.

9 See, e.g., R.A. Burt, "Constitutional Law and the Teaching of the Parables", *Yale Law Journal* 93/3 (1984), 455-502; R.K. Sherwin, "Rhetorical Pluralism and the Discourse Ideal: Countering *Division of Employment* v. *Smith*, A Parable of Pagans, Politics and Majoritarian Rule", *Northwestern University Law Review* 85/2 (1991), 388-441.

10 See, e.g., M.S. Ball, "Stories of Origin and Constitutional Possibilities", *Michigan Law Review* 87/8 (1989), 2280-2319; C. Weisbrod, "Practical Polyphony: Theories of the State and Feminist Jurisprudence", *Georgia Law Review* 24/4 (1990), 985-1018.

11 E. Carpenter and M. McLuhan, "Acoustic Space", in Edmund Carpenter and M. McLuhan eds., *Explorations in Communication* (Boston: Beacon Press, 1960), 65-70, at 65.

into making arguments and testimony visible in writing. Eyewitnesses are preferred over "ear-witnesses" whose reports are often dismissed as hearsay. Our judges and juries tend to give greater weight to visual evidence (in the form of both writings and exhibits) than to oral evidence; indeed, the existence of a visible written instrument may altogether preclude oral testimony as to the instrument's meaning (the "parol evidence" rule). The members of our appellate courts dedicate their professional lives to writing authoritative judgments which depend on reading briefs, precedents and statutes rather than listening to live witnesses or (given severe time limits on oral argument) even attorneys. Partly because the judicial process is so visually-oriented, American judges have traditionally shown great sensitivity to visible damage and injury. Nuisance plaintiffs who can show visible harm are usually better off than those who cannot. In defamation law, visible libel is taken more seriously than oral slander. In civil rights law, American visuality has favoured attention to the claims of "visible minorities" while it has had a subtly-marginalizing impact on claims made by other subjugated groups (such as the deaf) whose identities have been less visually-defined. Inside American law schools, scholars study written judicial opinions, not oral decisions or charges. For tenure and promotion purposes, visible scholarship counts for far more than aural teaching. "Scholarship" moreover tends to be identified with expository styles (analysis or essay, as opposed to story, dialogue or poem) that are narrowly "visual" insofar as they have no antecedents in oral experience.

Why are Americans so visually biased, both in life and law? One might posit that it is our twentieth-century technology of images — photography, motion pictures, television, computer graphics — that has turned Americans towards the visual. This technology has undoubtedly reinforced our visuality, but unfortunately for the hypothesis, our visuality is in fact substantially older than image technology itself. Given this, I would like instead to propose that American visuality is primarily a product of our society's dependence on the written word.[12]

This proposal is admittedly counterintuitive. We tend to think of

12 The hypothesis of a connection between visuality and writing is not entirely new. Although unfamiliar to most legal scholars, it has been advanced by such noted communications theorists as Walter Ong and Marshall McLuhan. See, e.g., W. Ong, *The Presence of the Word: Some Prolegomena for Cultural and Religious History* (Minneapolis: University of Minnesota Press, 1967), 8: "Writing shifts the balance of the senses from the aural to the visual ...".

the written word as "verbal" as opposed to "visual" (i.e. as language rather than image). But this is an overstated dichotomy. Certainly the written word is verbal and has implications as such, but in critical respects it is a visual medium as well. To appreciate it or manipulate it directly, we need (braille aside) to see it. When most of a culture's important content is written down, looking becomes a primary requirement and resource for cultural participation. It necessarily becomes the sensory focus(!) of intellectual indoctrination and effort. Even for those members of a writing-oriented society who cannot read or write, the visual surface assumes an unprecedented significance as pictures multiply in their capacity as the most convenient physical substitutes for (or supplements to) written words.

The intimate connection between writing and visuality has been indirectly and directly demonstrated at numerous junctures in Western history. Members of societies that have had little or no experience with writing have tended to value a variety of senses.[13] They may not have held all senses in equal esteem, but relative to contemporary America, their members have generally placed less emphasis on sight and more emphasis on sound. On the other hand, members of societies having had more experience with writing have given increased cultural weight to visuality and visual experience.[14]

Take, for instance, the marginally-literate society of pre-Hellenistic Greece. Its centrepieces were the great oral epics (the *Iliad* and the *Odyssey*) that continued to be recited long after they were written down around 700 B.C. Greek philosophers down to the time of Plato were not writers, but talkers. Their aural orientation encouraged them to describe thinking as "a dialogue of the mind ... with itself."[15] Early Greek scientists conceived of the universe as having an aural as well as a visual presence. Pythagoras became especially famous for speculating on

13 B.J. Hibbitts, "'Coming to Our Senses': Communication and Legal Expression in Performance Cultures", *Emory Law Journal* 41/4 (1992), 873-960.

14 None of this is intended to imply that any culture or group ever exceeds any other in its members' ability to hear, see, etc. It is merely to suggest that the attention and respect accorded to the various sensory channels is not physiologically or psychologically fixed in humans, but is rather contingent on historical and social circumstances.

15 Plato, "The Sophist" 263e, in E. Hamilton and H. Cairns, eds., *Plato: The Collected Dialogues* (New York: Pantheon Books, 1961).

the "music of the spheres." Early Greek law depended heavily on performances that implicated the ear as much as the eye; it was routinely understood as having intimate ties to oral poetry, and even music. The Greek word for law, *nomos*, was derived from a verb meaning "to recite" or "to read [aloud]."[16] *Nomos* itself could also mean "tune."[17] Early in the fourth century B.C., Plato metaphorically described the just man as one who "must have all three parts [of his soul] in tune with him ... exactly like the three chief notes of a scale."[18]

Early medieval Europe from the fifth well into the twelfth century A.D. was similarly indulgent of aurality. The words of God and man were primarily received not from texts, but from the lips of preacher and poet. It followed that early medieval "wise men" were those who heard well.[19] Early medieval jurisprudence thrived on orally-told stories and vaguely poetic phrases which stuck in the memory. Canon lawyers influenced by both the neo-Pythagorean philosophy of the Late Roman bishop Augustine and their own experiences in the chantries of cathedrals and monasteries exploited the connection between law and music: circa 1140, the monk Gratian evoked the Latin term chorda or "string" (of, e.g., a lyre) when he gave his famous *Decretum* the long-form title of *Concordia discordantium canonum*, meaning "the concordance [or 'harmonizing'] of discordant canons."[20]

16 J. Svenbro, *Phrasikleia: An Anthropology of Reading in Ancient Greece* (Ithaca: Cornell University Press, 1993), 4.

17 Aristotle later speculated that *nomos* meant both "law" and "tune" "because before men could write, they sang their laws to avoid forgetting them ...". Aristotle, *Problems* 920a (Cambridge: Harvard University Press, 1961).

18 Plato, "Republic" 443d, in W.H.D. Rouse, ed., *Great Dialogues of Plato* (New York: New American Library, 1956).

19 In pre-Christian Norse mythology, for instance, the guardian of heaven, Heimdellr, was so wise that "he could hear the wool grow on the sheep and the grass grow in the fields." A.F. Chamberlain, "Primitive Hearing and 'Hearing-Words'", *American Journal of Psychology* 16/1 (1905), 119-130, at 119. Right through the Middle Ages, Benedictine monks lived according to a Rule which analogously described success in one's spiritual life as hearkening to the call of God. N. Vest, "Ear of the Heart", *Parabola* 19/1 (1994), 42-45, at 42.

20 "Of course, *concordia* is etymologically derived from *cor*, *cordis*, 'the heart' and stands for 'an agreement of hearts, peace, order', but the association with chorda, 'string', leading to the idea of a 'harmony of strings' gives the word a 'poetic ambivalence which allows for a kind of metaphysical punning': indeed we find an interchangeable use of 'consonance' and concordia in the Vulgate, in

As both ancient Greece and medieval Europe became more familiar with and more dependent upon the written word, vision gained in social and intellectual status. Although aurality and its manifestations (e.g. rhetoric and music) remained culturally prominent, Aristotle concluded in the fourth century B.C. that "seeing is the superior sense."[21] Greek painting soon displaced more tactile sculpture and relief as the leading artistic form. Hellenistic Greek law accorded a new privilege to visual expression. Legal actions had to be commenced by a written complaint. Aristotle's metaphors for justice were visual rather than aural: in the *Ethics*, his ideal judge was a geometer, a bisector of visible lines.[22] In thirteenth century Europe, new Gothic architecture brought unprecedented amounts of light into churches which were rapidly filled with images and texts. Sight became the principal metaphor of spiritual knowledge and revelation.[23] The mirror became a fixture in life and, via metaphor, in literature. European law became notably "spectacular" as lawyers and jurists adopted brightly-collared robes and began to sit in courtrooms decorated with allegorical paintings. While retaining some of their aural and even dialogic qualities, legal rules, procedures, precedents and obligations were increasingly set down in written treatises, customals and sealed instruments. Finer copies of these were illuminated with detailed pictures of legal situations and allegorical tables of legal relations. Several late medieval legal texts — and several late medieval lawyers — were even described as "mirrors" that reflected what was good or right for the community.[24]

St. Augustine, in Boethius, to name only a few. If we consider the importance of musical theory for St. Augustine as a key to the understanding of the divine order of creation and salvation, it is surely no idle playing with words to point out these musical implications (should we say 'overtones'?) of Gratian's thought?" S. Kuttner, "Harmony from Dissonance: An Interpretation of Medieval Canon Law", in S. Kuttner, ed., *The History of Ideas and Doctrines of Canon Law in the Middle Ages* (London: Variorum Reprints, 1980), 4.

21 Aristotle, "On Sense and the Sensible" 437a, in R.M. Hutchins, ed., *Aristotle: I* (Chicago: University of Chicago Press, 1952).

22 Aristotle, "Ethics" 1132a, in Richard McKeon, ed., *Introduction to Aristotle* (New York: Modern Library, 1947).

23 See generally C. Erickson, *The Medieval Vision: Essays in History and Perception* (New York: Oxford University Press, 1976).

24 Perhaps the most famous example of a legal "mirror"-text is the German *Sachsenspiegel*, or "Mirror of the Saxons" composed in the early thirteenth cen-

As printing and literacy spread after the mid-fifteenth century, the pace of "visualization" in European society accelerated.[25] In France, René Descartes figuratively described thinking not as dialogue, but as seeing.[26] In England, John Locke analogized the mind to a *camera obscura.* Largely under the influence of the early printing press's iconographic and chromatic limitations, however, written words replaced images as primary visual artefacts. Churches and courtrooms across much of Europe were stripped of their artwork. The working robes of many lawyers and judges faded to a combination of black and white that incidentally evoked the colours (and perhaps also the authority) of the printed page. In the midst of a legal environment rapidly becoming saturated with paper pleadings, documents and printed texts of all sorts, seventeenth century English legal commentators such as Edward Coke and John Doderidge insisted on characterizing themselves and their readers as "observers";[27] they sought to offer the public an "image" or "view" of law,[28] which they increasingly compared to light or line ge-

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tury; also note the rather more dubious English work *Mirror of Justices,* written in law-French c.1285-90, and the canon law text *Speculum Abbreviatum* ("Abbreviated Mirror"), composed in Germany in the early fourteenth century. As to lawyers being identified as "mirrors," note the thirteenth century French canonist Guillaume Durand, known as Speculator, the early fourteenth century Italian canonist Joannes Andrae, called *speculum et lumen juris canonici* ("Mirror and light of the canon law") and the contemporary Italian commentator Bartolus, referred to simply as *speculum juris* ("Mirror of the law"). See generally D.M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), 384, 1169-70.

25 H.A. Innis, *The Bias of Communication* (Toronto: University of Toronto Press, 1951), 138 ("The discovery of printing in the middle of the fifteenth century implied the beginning of ... a type of civilization dominated by the eye rather than the ear."); M. McLuhan, *The Gutenberg Galaxy* (Toronto: University of Toronto Press, 1962).

26 "[W]e shall learn to employ our mental intuition by comparing it with the way we employ our eyes." Quoted in Evelyn Fox Keller and Christine R. Grontworski, "The Mind's Eye", in S. Harding and M. Hintakka, eds., *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology and Philosophy of Science* (Boston: D. Reidel, 1983), 207-224, at 214.

27 See, e.g., E. Coke, *The Fourth Part of the Institutes of the Laws of England* (London: E. and R. Brooke, 1797), 20, 29, 31, 33, 44, 63, 74 and *passim* (originally published 1641).

28 Thus John Doderidge, who wrote that he had composed his work for those "who covet to contemplate in their inward eye the express and perfect image of

ometry.

In the eighteenth and nineteenth centuries, writing and visuality matured together. Improvements in print technology enabled more printed matter to be produced at less cost. Under the impetus of this mass production, European and American literacy rates reached unprecedented levels. Philosophers actually proclaimed the 1700s the "Age of Enlightenment." In the mid-nineteenth century, John Ruskin announced that "the greatest thing a human soul ever does in this world is to see something."[29] In a variety of contexts, vision became a sensory cipher for the exercise of power. Designs for asylums and prisons (such as Jeremy Bentham's "Panopticon") that enabled authorities to continually survey their inmates gave the sane power over the insane, and the obedient power over the criminal. Vision even became an instrument of imperialism, as exhibitions at home of exotic colonial lifestyles abroad gave Europeans psychological power over their overseas possessions.[30] Aurality was simultaneously marginalized. Rhetoric was literally flattened into the more visual study of belles-lettres. Aural concepts such as the "music of the spheres" were driven from the realm of serious scientific discourse. The dialogue was virtually abandoned as a leading literary device. In English law, printed books finally displaced aural exercises as the locus of legal learning; in his famous set of *Commentaries*, William Blackstone offered his readers a "general map of the law."[31] In late eighteenth century America, the new federal and state governments subordinated themselves to written constitutions. In the nineteenth century, the United States Supreme Court began to set time limits on oral argument[32] while turning towards a "textual" style of constitutional interpretation that focused on the meaning of visible, documented words

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an English lawyer [and who desire] to view [various aspects of law] in their particular charge and duty." J. Doderidge, *The English Lawyer* (Abingdon: Professional Books, 1980) (originally published 1631), 1.

29 Quoted in D. Ackerman, *A Natural History of the Senses* (New York: Random House, 1990), 227.

30 See generally T. Mitchell, "The World as Exhibition", *Comparative Studies in Society and History* 31/2 (1989), 217-236.

31 W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765), 35.

32 S.M. Shapiro, "Oral Arguments in the Supreme Court", *Supreme Court Historical Society Yearbook* (1985), 22-34.

rather than on the living contexts of their original construction. [33]

Given the long association between writing and visuality, it is possible to construe the various visual legal metaphors with which I began this article as yet another legacy of America's dependence on the written word. In a cultural environment where most important information (including law) has been visually inscribed, it has been semantically convenient for Americans to "observe" the law, "review" decisions, and seek protection in the "penumbras" of the constitution. Such visual practices or phenomena have readily come to mind as meaningful poles of figurative comparison. Beyond mere convenience, however, these and other visual metaphors have arguably done much to make American law familiar and legitimate to its subjects. A law expressed in visual terms is inevitably more accessible, more recognizable and more agreeable to members of a writing-based, visually-biased society than a law expressed in, say, tactile metaphors. Readers who would doubt this might consider their instinctive reaction to the prospect of a high court "refeel" of a lower court judgment.

Today, however, the American cultural environment is changing. It is obvious that we still prize sight, seeing and their various instrumentalities, but there are numerous signs that we are increasingly fascinated with aural expression and experience. [34] Most of us listen to the news rather than read it. The market for so-called "talking books" is growing at a phenomenal rate. Music has become omnipresent. We are taking a new interest in poetry readings and oral storytelling. We are ever more sensitive to accents, to the point where the last few years have witnessed a flurry of cases alleging "accent discrimination." [35] We increasingly express understanding by the phrase "I hear you," while more and more of us seem to endorse ideas or proposals (including those made on paper) by saying that they "sound good." Even the style of our expository writing is more overtly conversational than it once was; first-person pronouns and contractions, once largely limited to spoken language, are be-

33 S. Sherry, "The Founders' Unwritten Constitution", *University of Chicago Law Review* 54/4 (1987), 1127-1177.

34 See, e.g., W.J. Ong, *Orality and Literacy: The Technologizing of the Word* (New York: Methuen, 1982), 136-138; S. Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (New York: Free Press, 1990), 186-188.

35 See generally M.J. Matsuda, "Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction", *Yale Law Journal* 100/5 (1991), 1329-1407.

coming commonplace in print.

The impact of the new cultural aurality is evident in many areas of American law. Of course, American lawyers and jurists never abandoned faith in speech and aural styles. It is nonetheless true that contemporary American judges are treating aural expression with a respect unprecedented in this century. Hearsay rules are rapidly being loosened.[36] Oral defamation is receiving greater attention.[37] Meanwhile, American law professors are reasserting the value of aural teaching as an antidote to the intellectual privileging of written scholarship.[38] More and more of that scholarship is being disseminated at professional conferences and colloquia featuring speakers and organized discussions. Inside and outside the conference hall, American legal academics are becoming noticeably more absorbed by the process and rhetoric of oral argument, and concomitantly less obsessed by written appellate decisions. A significant number of legal scholars are analogously fascinated by law's relationship with such traditionally — or actually-aural forms of expression as story, speech, poetry, parable and music. A variety of brave and iconoclastic souls are even re-casting their jurisprudential scholarship in story, dialogue and poem.[39]

What is causing Americans to turn towards the aural in so many different ways? The history of Western culture over the past hundred and twenty-five years suggests that the recent indulgence of aurality is largely a product of new aural technologies. In essence, cultural aurality has tended to become more pronounced as aural technologies have multi-

36 See, e.g., E. Swift, "The Hearsay Rule at Work: Has it Been Abolished De Facto by Judicial Decision?", *Minnesota Law Review* 76/3 (1992), 473-505.

37 See, e.g., M.J. Mannheimer, "The Fighting Words Doctrine", *Columbia Law Review* 93/6 (1993), 1527-1571.

38 See, e.g., J.S. Elson, "The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?", *Journal of Legal Education* 39/3 (1989), 343-381.

39 See, e.g., D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987); P. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991); A.W. McThenia Jr., "Telling a Story About Storytelling", *Journal of Legal Education* 40/1 (1990), 67-76; L.J. Sirico Jr., "Vietnam Haiku", *Cornell Law Review* 74/6 (1989), 1228-1233; S. Burris, "Death and a Rational Justice: A Conversation on the Capital Jurisprudence of Justice John Paul Stevens", *Yale Law Journal* 96/3 (1987), 521-546.

plied and spread. At every stage in this process, the existence of these technologies has radically extended the power and range of aurally-communicated information. As technologically-transmitted and amplified sound has become able to assume more of the cultural burden, culture itself has turned towards sound for intellectual inspiration.

The first generation of modern aural technologies — the telephone and the phonograph — appeared and spread between roughly 1875 and 1920. Already in that period, sound began to have a discernable impact on a variety of different disciplines and undertakings. In linguistics, Ferdinand de Saussure departed from then-conventional academic wisdom to argue that language was speech, as opposed to writing or any combination of speech and writing.[40] The philosophers Henri Bergson and Edmund Husserl turned to dynamic aural phenomena such as tone and melody for metaphoric antidotes to the prevailing spatialized and visualized — and hence strangely static — idea of time. Italian Futurist painters used several unusual techniques to evoke aural experience in their work. Coincidentally or not, American legal scholars such as Roscoe Pound began to reassert the importance of understanding the multisensory "law in action," as opposed to the purely visualist "law in the books."[41]

The years between 1920 and 1950 witnessed the development of a second generation of aural technologies. Radio was born in the early 1920s and reached its peak of social power in the 1940s. In the later 1920s, recorded speech and music were introduced to the motion-picture theatre. In this context, sound assumed a higher cultural profile. Poets such as T.S. Eliot and Ezra Pound evoked musical formats and used language to achieve striking aural, even lyrical effects in their work. In *Being and Time* (1927), the young German philosopher Martin Heidegger found himself drawn to aural metaphors of knowing and belonging.[42] In *I and Thou* (1933) the Jewish theologian Martin Buber

40 For a brief consideration of the connection between Saussure's thought and the development of telephony, see R. Hopper, *Telephone Conversation* (Bloomington: Indiana University Press, 1992), 36-37.

41 R. Pound, "Law in Books and Law in Action", *American Law Review* 44/1 (1910), 12-36.

42 For a brief discussion of this aural turn, see J.D. Caputo, "The Thought of Being and the Conversation of Mankind: The Case of Heidegger and Rorty", in Robert Hollinger, ed., *Hermeneutics and Praxis* (Notre Dame: University of Notre Dame Press, 1985), 248-271, at 255.

stressed the importance of a life based on inter-subjective "dialogue," a concept which also animated the writing of Russian literary critic Mikhail Bahktin, who joined it with the notion of "polyphony." At about the same time in America, Judge Jerome Frank launched a concerted attack on the narrowly-visualist orientation of traditional American legal thought. He called for a revised form of legal education that would give students the opportunity to hear and see the law as it was actually argued. He repeatedly suggested that to achieve greater accuracy, trial case records should henceforward take the form of "talking movies" instead of written transcripts.[43] He adopted a distinctly Saussurian attitude in asserting the essential "spokenness" of legal language, and in the late 1940s took the even more radical step of overtly rejecting architectural, visualist metaphors for law (e.g. law as "structure") in favour of a "new" aural analogy between law and music.[44]

Since 1950, we have seen the spread of a third and perhaps even the birth of a fourth generation of aural technologies. The development of magnetic tape at the end of World War II made sound recording — and hence the study and cultural recognition of sound — much easier than it had been before. In the 1950s, the audio-visual medium of television joined radio in the home. In the 1960s and 70s, transistor radios and stereos were all the rage. Since 1980, tape technology has been radically miniaturized in Walkmans and digitized by computers in ways that have made music and the spoken word the ready companions of our every waking moment. In such circumstances, sound's cultural stock has gone up yet again. Over the last few decades, rhetoric has been reborn as a serious academic discipline. Anthropology has been explicitly reconceived as "the study of man talking."[45] A growing number of Continental (especially French) philosophers have pointedly rejected visual

43 See, e.g., J. Frank, *Law and the Modern Mind* (Garden City, N.Y.: Anchor Books, 1963), 118 n.9 (originally published 1930).

44 Anon. Y. Mous, "The Speech of Judges: A Dissenting Opinion", in B.F. Kristen, ed., *A Man's Reach: The Philosophy of Judge Jerome Frank* (New York: Macmillan, 1965), 35-47; J. Frank, "Words and Music: Some Remarks on Statutory Interpretation", *Columbia Law Review* 47/8 (1947), 1259-1278; J. Frank, "Say it with Music", *Harvard Law Review* 61/6 (1948), 921-957.

45 S.A. Tyler, "Post-modern Anthropology", in P.P. Chock and J.R. Wyman, eds., *Discourse and the Social Life of Meaning* (Washington: Smithsonian Institution Press, 1986), 23-49.

metaphors for telling and knowing,[46] while a notable variety have re-asserted the actual and figurative value of aurality.[47] The idea or ideal of life and thought as "dialogue," "discourse" or "conversation" has gained momentum thanks largely to the writings of Hans-Georg Gadamer, Jurgen Habermas, and Richard Rorty.[48] Aurality has even been heralded as a guiding principle of the new Postmodernism.[49] In American law, the 1950s and 1960s witnessed the tentative re-appearance of actual dialogues in legal literature. Most of the aural, aurally-empowering, aurally-evocative or aurally-sensitive features of contemporary American legal life and scholarship that I mentioned earlier in this section are nonetheless products of the last ten to fifteen years. During this time, the lawyers and jurists who grew up in the sound-saturated 1960s and 1970s have come of professional age; more than a few of these individuals have brought to their work and writing the comfortable relationship with aurality that they developed in their youth. Their aural inclinations have only been validated and encouraged by the habits and expectations of newly-admitted lawyers and legal scholars of the "Walkman generation."

In this new "age of sound," is it any wonder that the language of the American legal academy has itself acquired a new aurality? If, largely thanks to new technologies, language and even law itself are increasingly experienced or presented as things spoken or heard, it is surely sensible and even helpful to figuratively describe law as "voice," "rhetoric" or

46 See generally M. Jay, *Downcast Eyes: The Denigration of Vision in Twentieth-Century French Thought* (Berkeley: University of California Press, 1993).

47 French political economist Jacques Attali has penned what might be described as provocative "manifesto" for this diverse group: "For twenty-five centuries, Western knowledge has tried to look upon the world. It has failed to understand that the world is not for beholding. It is for hearing. It is not legible [note here Attali's implied linkage of visuality and writing], but audible." J. Attali, *Noise: The Political Economy of Music* (Minneapolis: University of Minnesota Press, 1985), 3.

48 Rorty has gone so far as to argue that "we must get the visual, and in particular the mirroring metaphors out of our speech altogether." R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979), 371.

49 See T. Docherty, *After Theory: Postmodernism/Postmarxism* (New York: Routledge, 1990), 16: " *...postmodernism prioritizes the aural*; it ... works against the specular and even against theory or speculation in order to re-install the lost sense of hearing."

"discourse," and to perceive injustice as "silencing."[50] If legal ideas and insights tend increasingly to emerge from conversations or colloquia, it is convenient and to some extent even literally accurate to approach law as "dialogue" or "talk." If law operates within a society staturated with radiophonic and stereophonic music, it can certainly aspire to "polyphony." Such metaphoric expressions and turns of phrase have an instant appeal born of the new familiarity and immediacy of aural experience. At the moment, this appeal may be felt more strongly in the legal professoriate than in the more hierarchical and culturally-conservative confines of the legal profession or the judiciary, but as aurality becomes increasingly prominent and powerful, aural metaphors will likely infiltrate those quarters as well.

American Legal Metaphor in Sociological Context

The second factor effecting change in the sensory orientation of American legal language is essentially sociological. American society has traditionally been dominated by collectivities of men, whites, Anglophones ("Anglos") and Protestants which may be said to have accorded a higher status to visual expression and experience than have the collectivities comprised by women, African-Americans, Hispanics, Catholics and Jews respectively. The visual bias of the former American groups is arguably attributable to the relative prominence of writing in the historical and social experience of their members, just as the visuality of American culture as a whole is arguably attributable to the relative prominence of writing in our historical circumstances. Of course, the relative prominence of writing in the experience of the former groups has been largely realized by the calculated efforts of their members to prevent or limit the latter groups' access to writing, written material and/or the institutions in which that material has been taught. Some of the latter groups have nevertheless had genuine reservations about writing, having had (sometimes literally) as much if not more faith in aural forms of expression more closely tied to their own traditions and beliefs.

The relative visuality of those American groups which have favoured

50 "As the predominant form of communication shifts, ... legal metaphors ... change to reflect the changes in communication." E. Katsh, "Law in a Digital World: Computer Networks and Cyberspace", *Villanova Law Review* 38/2 (1993), 403-485 at 406 n.14.

or have historically been more dependent on writing has been manifested or revealed in various ways. For instance, American men s culture has been identified by American feminist scholars as peculiarly dependent on the power of "the gaze" to confine and control the physical and social world. These scholars have defined patriarchy as (among other things) a "specular system" favouring men and disfavouring women who — transfigured by men into visible objects, texts, paintings, photographs, electronic images and diagrams — are literally seen and not heard.[51] It has notably been suggested that men are particularly inclined toward visual metaphors, readily equating knowledge with "illumination," knowing with "seeing" and truth with "light."[52] By contrast, the visuality of American women's culture may be said to have been significantly qualified. Long denied equal access to the products of American visual culture, and even discouraged by male prejudice from using the eyeglasses frequently necessary for the full recovery of visual and especially textual meaning,[53] American women as a group have been relatively more indulgent of aural media as carriers of their gendered experience. Compared to American men, they have historically shared a greater proportion of their knowledge, experiences and thoughts with one another by talking and listening, telling stories and engaging in the intimate dialogue that men have pejoratively dismissed as "gossip."[54] The extent to which American women still define and experience their lives in aural terms is evident in the emphasis that contemporary

51 Contemporary feminist opposition to pornography is at least partly based on the fact that it is purely visual, disconnected from any other form of sensory engagement. See, e.g., S. Griffith, *Pornography and Silence* (New York: Harper & Row, 1981), 34: "The man who stares at a photograph of a nude woman is a voyeur. He can look freely and turn away when he wishes. He can run his hands over the two-dimensional surface, but he will not be touched. He can know the body of a woman, and yet encounter a knowledge that will not change him ...".

52 M.F. Belenky et al., *Women's Ways of Knowing: The Development of Self, Voice and Mind* (New York: Basic Books, 1986), 18.

53 "Men don't make passes at girls who wear glasses."

54 This statement must be clearly distinguished from the (by most sociological accounts, inaccurate) stereotype that women talk more than men. The stereotype purports to compare how much women and men talk in absolute terms; the statement in the text simply says that regardless of how much (or how little) women or men talk, American women, given their limited access to writing, have traditionally had to depend on talk more than have men.

American feminists place on women's talk (especially "consciousness-raising") as a technique of validation and empowerment. It is equally evident in the prominence of oral history in feminist studies, as well as in feminist art history which rejects the notion of art as purely visual experience unmediated by language. Even more important for present purposes, several feminist psychologists have found that

> in describing their lives, [American] women commonly talked about voice and silence: "speaking up", "speaking out", "being silenced", "not being heard", "really listening", "really talking", "words as weapons", "feeling deaf and dumb", "having no words", "saying what you mean", "listening to be heard", and so on in an endless variety of connotations ... We found that women repeatedly used the metaphor of voice to depict their intellectual and ethical development.[55]

The relatively more-visual orientation of white American culture may well have originated in the already-established textual traditions of the first European colonists to settle America. These traditions were nurtured within an American educational system (confined mostly to white Americans) that consciously taught its pupils to look out at the world through the lens provided by the written word. Raised on a formal pedagogy of "reading, writing and arithmetic," white Americans (as a group) came to regard visible texts as primary measures of cultural worth; they gradually lost a critical measure of intellectual respect for aural performances[56] and even for those texts that imitated aural styles and situations.[57] On the other hand, such African-American intellectuals as Cornel West and Michele Wallace have asserted that African-American culture has been relatively more oriented (or, perhaps more

55 Belenky, *supra* n.52, at 18.

56 See, e.g., B. Baskerville, "19th Century Burlesque of Oratory", *American Quarterly* 20/4 (1968), 726-743; B. Baskerville, "Principle Themes of Nineteenth-Century Critics of Oratory", *Speech Monographs* 19/1 (1952), 11-26.

57 On white American authors' nineteenth century rejection of overtly "declamatory" styles, see D.J. Boorstin, *The Americans, The National Experience* (New York: Vintage Books, 1965), 307-324. As recently as 1986, African-American legal scholar Linda Greene implicitly recognized the ongoing intellectual prejudice of most white legal academics against aurally-evocative textual forms in wondering whether some would say of Derrick Bell's dialogic legal chronicles, "'isn't it a bit contrived to discuss a subject as important as equity through conversations?'" L. Greene, "A Short Commentary on the Chronicles", *Harvard Blackletter Journal* 3 (1986), 60-64 at 62.

accurately, skewed) towards aural experience.[58] African-American culture is deeply and proudly rooted in ancient African oral traditions.[59] It has endured and even thrived in the face of successful efforts by white Americans to at first statutorily prohibit and then informally restrict African-American access to literacy and literate schooling. The culture still lives most vivaciously in story, sermon, and song, all supported by a now-voluminous written literature that in the hands of the best African-American authors remains consciously sensitive to aural experience.[60] The poet Maya Angelou has thus declared:

> I write for the Black voice and any ear which can hear it. As a composer writes for musical instruments and a choreographer creates for the body, I search for sound, tempos and rhythms to ride through the vocal cord over the tongue and lips of Black people ... I accept the glory of stridencies and purrings, trumpetings and sombre sonorities.[61]

The visual bias of American "Anglo" culture rests on two factors: first, on its English-speaking members' domination of the American visual media and, second, on the ancestral or linguistic attachment of those individuals to an English culture that traditionally placed greater

58 According to West, "there are two *organic* intellectual traditions in African-American life: the black Christian tradition of preaching and the black musical tradition of performance. Both traditions, though undoubtedly linked to the life of the mind, are oral, improvisational and histrionic ... The richness, diversity and vitality of the traditions of black preaching and black music stand in strong contrast to the paucity, even poverty, of black literate intellectual production." C. West, "The Dilemma of the Black Intellectual", *Journal of Blacks in Higher Education* (Winter 1993/94), 59-67 at 61. In a related context, Wallace has observed that "African Americans have not produced (because they have been prevented from doing so by intra-racial pain and outside intervention) a tradition in the visual arts as vital and compelling to other Americans as the Afro-American tradition in music." M. Wallace, "Modernism, Postmodernism and the Problem of the Visual in Afro-American Culture", in R. Ferguson et al., eds., *Out There: Marginalization and Contemporary Culture* (Cambridge: MIT Press, 1990), 39-50, at 40.

59 R.D. Abrahams, ed., *Afro-American Folktales* (New York: Pantheon Banks, 1985), 17-18.

60 See generally J.F. Callahan, *In the African-American Grain: The Pursuit of Voice in Twentieth-Century Black Fiction* (Urbana: University of Illinois Press, 1988); G. Jones, *Liberating Voices: Oral Tradition in African American Literature* (Cambridge: Harvard University Press, 1991).

61 M. Angelou, "Shades and Slashes of Light", in M. Evans, ed., *Black Woman Writers* 1950-1980 (Garden City, N.Y.: Anchor Press, 1984), 3-5, at 3-4.

emphasis on reading and writing than did some other European societies. In the face of social intolerance for the Spanish language in the United States, many Hispanic Americans have been forced to literally or culturally retreat into the soundscapes of their own communities, where aurality born of discrimination and necessity has been positively reinforced by strong Spanish and Native American oral traditions. There, to quote one Hispanic commentator, "the spoken language has been the primary means of transmitting from one generation to another information that is considered significant."[62] Like its African-American counterpart, modern Hispanic American literature — directly and indirectly drawing on "cuentos" (oral traditional tales) and "corridos" (ballads) — still celebrates in its aural heritage.[63]

Finally, American Protestantism (for all its awkward diversity) has consistently demonstrated a relatively-visual bent in its bias towards Biblical text as the true and only word of God (*sola scriptura*). In this context, reading has been considered more than just a skill: it has been regarded as a sure route to salvation. By contrast, American Catholicism has placed relatively more emphasis on aural tradition and aural (even catechistic) liturgical practices. The Catholic Church continues to stand by a 1546 ruling of the Council of Trent which declared aural dogma to be equivalent to the Scriptures themselves by virtue of the former having been "received by the apostles from the lips of Christ himself, or by the same apostles at the dictation of the Holy Spirit."[64] American (or, for that matter, North American) Catholic culture has consequently been relatively less committed to a strictly visualist interpretation of exis tence, to the extent that two of the foremost exponents of aurality since the 1960s have been a Catholic convert (Marshall McLuhan) and a Jesuit priest (Walter Ong). The various strands of American Judaism also are arguably based (albeit to different degrees) on a more thorough fusion of visual and aural traditions. Jews may be popularly known as "People of the Book," but such Jewish commentators as Martin Buber, José Faur

62 A.D. Trejo, "Of Books and Libraries", in A.D. Trejo, ed., *The Chicanos: As We See Ourselves* (Tucson: University of Arizona Press, 1979), 167-186, at 172.

63 See generally J.E. Limon, "Oral Tradition and Poetic Influence: Two Poets from Greater Mexico", in A.L.B. Ruoff and J.W. Ward Jr., eds., *Redefining American Literary History* (New York: Modern Language Association of America, 1990), 124-141.

64 S.L. Greenslade, ed., *Cambridge History of the Bible*, vol. 3 (Cambridge: Cambridge University Press, 1963), 193.

and Susan Handelman have suggested that the implicitly and sometimes explicitly-dialogic nature of that book — the Hebrew Bible — together with the tenacity of the aural practices that have traditionally surrounded the teaching of both written and "oral" Torah[65] have both reinforced and reflected a limited Jewish reverence for visual experience.[66] In marked contrast to the visibility of Christ in the New Testament,[67] Yahweh in the Old Testament preferred not to show Himself or permit Himself to be shown (thus, the Second Commandment: "You shall not make yourself a graven image ..."). Instead, Yahweh spoke to Israel either directly or through his prophets (hence, the classic formula "Hear O Israel ..."). [68] Even in modern times, "the vehicle of ... social and political cohesion" in the Jewish community has been a language — Yiddish — that until very recently was spoken but hardly ever written.[69]

Taking advantage of the social power that their relatively greater access, exposure or commitment to writing has helped to give them, American men, whites, Anglos and Protestants have filled the ranks of the American legal profession from its very beginnings. It is they who have been principally responsible for designing courts and legal rules that have directly and indirectly favoured visual experience. It is they who

65 Despite preserving the "sayings" of the rabbis and retaining its traditional appellation (facts that in themselves suggest the importance of aurality in Jewish tradition), "oral" Torah has existed in writing since the third century C.E.

66 Faur, for example, has recently posited that "For the Hebrews, the highest form of truth is perceived at the auditory level ... The highest expression of reality is found in communicative speech. The outer aspect of things is unimportant. Neither Scripture nor the rabbis gave visual descriptions of things or people." J. Faur, *Golden Doves with Silver Dots: Semiotics and Textuality in Rabbinic Tradition* (Bloomington: Indiana University Press, 1986), 29-30. But see also D. Boyarin, "The Eye in the Torah: Ocular Desire in Midrashic Hermeneutic", *Critical Inquiry* 16/3 (1990), 532-550, arguing that the importance of visual revelation in Judaism has traditionally been underestimated.

67 "And the Word became flesh and dwelt among us ...; we have beheld his glory." *John* 1:14.

68 The notion of "Yahweh as speaker" is magnificently captured in the rabbinic legend that holds that if all things in the world were to fall silent, humankind would hear the voice of God from Sinai, incessantly pronouncing the words of the Ten Commandments. D.J. Wolpe, *In Speech and in Silence: The Jewish Quest for God* (New York: H. Holt, 1992), 45.

69 B. Yarshav, *The Meaning of Yiddish* (Berkeley: University of California Press, 1990), 79.

have established and perpetuated norms of legal interpretation and scholarship that (at least until recently) have largely marginalized and delegitimated aurality, aural styles or aurally-based written forms.

When they have had to explain the law, the relative visuality of the American male, white, Anglo and Protestant communities has arguably inclined their members to prefer metaphors which characterize law not so much as a speaking or as any kind of aural enterprise, but as a looking, something to see and be seen. This visual figurative language has inevitably empowered the members of these groups by making law more recognizable and accessible to them. At the same time, it has arguably made American law subtlely more alien and distant to American women, African-Americans, Hispanics, Catholics and Jews whose cultures have not shared its visualist bias. Law expressed in visual terms has literally not resonated with their particular experiences.

But of course the gender, racial, ethnic and religious composition of the American legal community is changing. In the wake of various social revolutions ranging from the Civil Rights movement of the 1960s to the looser diversity movement of the 1990s, more women, African-Americans, Hispanics, Catholics and Jews are joining the American legal profession — and, in particular, the American legal professoriate — than ever before. As their numbers attain what has been described as a "critical mass" (in some cases, still a very low percentage of the total), an increasing number of individuals within these self-styled "outsider" groups[70] seem willing to reinterpret and re-engage the values and forms of American law in light of their own cultural experiences, including their aural traditions. For instance, one young African-American law professor has challenged the prevailing academic emphasis on visible scholarship (as opposed to aural teaching) on the grounds that as an African-American whose culture has long depended on aurality, she "cannot believe in the privilege of the written word ... for what would that say about the relative importance of things that I hold dearest in my heart, things that were taught to me by unlettered men and women, or whispered by a lover, or giggled about on the phone with a friend."[71] Specifically writing of the task before the minority female legal scholar,

70 See, e.g., M.I. Coombs, "Outsider Scholarship: The Law Review Stories", *University of Colorado Law Review* 63/3 (1992), 683-716.

71 O.R. Neal, "The Making of a Law Teacher", *Berkeley Women's Law Journal* 6/1 (1990-91), 128-135 at 133.

another African-American law professor has evoked and recommended attention to aural tradition by suggesting that "her work should contain something of the essence of the culture that she has lived and learned: imagine, if you will, writing a law review article embodying the spontaneity of jazz, the earthiness of blues, or the vibrancy of salsa."[72]

One already-recognized effect of bringing outsiders and outsider traditions to bear on American legal scholarship is the recent proliferation of forms such as story, dialogue, poetry and even lyric in American legal literature.[73] While outsiders have hardly monopolized these aurally-evocative formats, outsider scholars have identified them as possessing a special attraction which has caused them to appear more frequently in outsider legal scholarship than in the scholarship of "majority" legal scholars. For instance, Richard Delgado has noted the link between feminist legal narrative and women's consciousness-raising which, he notes, "consists, in part, of the sharing of stories, of tales from personal experience."[74] Derrick Bell has related the format of his dialogue-chronicles to African storytelling customs.[75] Delgado has analogously connected Hispanic legal stories, chronicles and dialogues to "Mexican-American ... corridos (ballads) and stories, passed on from generation to generation."[76] Michael Olivas has made the same connection, and has also tied his own enthusiasm for stories to his Catholic upbringing and his period of training in a Catholic seminary.[77] Robert Cover, the late

72 R. Austin, "Sapphire Bound!", *Wisconsin Law Review* (1989), 539-578 at 543.

73 See, e.g., J.B. Baron, "Resistance to Stories", *Southern California Law Review* 67/2 (1994), 255-285 at 258: " ...much of the interest in and use of stories comes from women and people of color."

74 R. Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative", *Michigan Law Review* 87/8 (1989), 2411-2441 at 2436.

75 "The use of stories to make a point is, of course, a well-known African tradition ...". D. Bell, "The Final Report: Harvard's Affirmative Action Allegory", *Michigan Law Review* 87/8 (1989), 2382-2410 at 2394. See also Neal, *supra* n.71, at 133 ("I suspect that some of the storytelling in the new written legal scholarship produced by people of color is an attempt, however, subconscious, to bridge a gap between oral traditions and written traditions.").

76 Delgado, *supra* n.74, at 2436.

77 M.A. Olivas, "The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History", *Saint Louis University Law Journal* 34/3 (1990), 425-441 at 427, 440.

Jewish-American legal scholar who did so much to encourage legal academics to take narrative seriously, overtly acknowledged Hebrew civilization's "magnificent use of [that form] to explore great normative questions."[78]

It is in the same process of drawing greater professional inspiration from their own aural traditions that a disproportionately-high number of prominent feminist, African-American, Hispanic and Jewish legal scholars (especially those dedicated to defining the parameters of new schools of jurisprudence which they might call their own) have lately been drawn towards aural metaphors. One observer has been so struck by this tendency that he has described the collective work of these individuals as "voice scholarship."[79] For example, feminist legal academics such as Martha Minow, Mari Matsuda, Catherine MacKinnon and Mary Ann Glendon — coming from an American women's culture that has long respected and has been largely sustained by aural interaction — are promoting the idea of law as "dialogue" and "talk" and are describing injustice as "silencing."[80] African-American legal scholars such as Jerome Culp, Patricia Williams and Lani Guinier — coming from an African-American culture that treasures and celebrates the power of the aural word — are challenging their white colleagues to "hear ... what scholars of colour speak"[81] and to listen for "voices lost in the chasm"[82] so that they might begin a broader democratic "conversation"[83] on the

78 R.M. Cover, "The Supreme Court, 1982 Term — Foreword: Nomos and Narrative", *Harvard Law Review* 97/1 (1983), 4-68 at 6 n.9.

79 Delgado, *supra* n.2, at 109.

80 See, e.g., M. Minow, "Interpreting Rights: An Essay for Robert Cover", *Yale Law Journal* 96/8 (1987), 1860-1915; M.J. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations", *Harvard Civil Rights-Civil Liberties Law Review* 22/2 (1987), 323-399, at 323; C. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989); M.A. Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (Cambridge: Harvard University Press, 1987).

81 J.M. Culp Jr., "You Can Take Them to Water but You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars", *University of Illinois Law Review* (1992), 1021-1041.

82 Williams, *supra* n.39, at 201.

83 For a brief discussion of the prominence of this metaphor in Lani Guiniers's writing, see D. Russakoff, "Lani Guinier: In Person", *Washington Post* (National Weekly Edition), Dec. 20-26th, 1993, p.6.

American future. Hispanic legal scholars such as Michael Olivas and Richard Delgado — coming from an Hispanic culture that prizes both its secular aural traditions and its catechistic Catholic heritage — are writing legal articles in the idiom of hearing and listening. Jewish legal scholars such as Robert Burt and George Fletcher are figuratively depicting law as "parable"[84] and "discourse," drawing — as Fletcher explicitly acknowledges — on "the Jewish tradition, beginning with the Bible, blending into the oral law, finding refinement in the Talmud and continuing to this day ...".[85] All of these individuals are arguably trying to reconcile a recalcitrantly-visualist American jurisprudence with their divergent cultural experiences; at stake is the empowerment such a reconciliation potentially entails. In this context, appreciating the gender, racial, ethnic and even religious roots of many of the purveyors of the new aural metaphors may be a critical prerequisite to understanding the growing popularity of those metaphors in American legal language.

American Legal Metaphor in Phenomenological Context

The third factor favouring the contemporary shift towards aural metaphors in American law may be described as phenomenological. Traditionally, the values embraced and reflected in American law have corresponded rather neatly with the values supposedly favoured by the phenomenon of vision. Law, in the traditional sense, has been understood as abstract, disengaging, objective, determinate, timeless and systematic. It has been understood as abstract to the extent that its rules, principles and such legal constructs as "the reasonable man" are generalizations independent of particular concrete circumstances. It has been regarded as disengaging to the extent that it allows and even encourages parties to pursue their own autonomous self-interests free from the involvement or interference with others (hence the concept of "rights"). Law has been considered objective in that it exists apart from — and is supposedly applied regardless of — the feelings or whims of individual judges or lawyers or their personal attitudes towards the disputing parties. It has been held to be determinate insofar as it has been assumed that proper legal analysis leads to "one right answer." Traditional

84 Burt, *supra* n.9.

85 G.P. Fletcher, "Law as Discourse", *Cardozo Law Review* 13/5 (1992), 1631-1637 at 1632.

American legal thought has conceived of law as timeless insofar as its core principles — if not always its specific rules — remain constant. Law has been viewed as systematic in that its rules and principles are presumed to be related to each other in a coherent deductive pattern.

Each of these qualities of law has been matched by a characteristic of vision, at least as American and other Western philosophers have encouraged us to understand that phenomenon. For instance, vision is said to be an abstract sense because it does not depend on physical contact or proximity with concrete reality, but rather on withdrawal. "The best view is by no means the closest view; to get the proper view we take the proper distance, which may vary for different objects and different purposes, but which is always realized as a positive and not a defective feature in the phenomenal presence of the object."[86] To this extent, sight literally abstracts one from the world — certainly not completely, but more than the other senses.

Because it depends on abstract withdrawal, vision is considered to facilitate social disengagement. Well before one reaches the outer limits of visual (as opposed to aural or tactile) perception, the urge, the need and sometimes even the ability to actively interact with one's potential interlocutor is reduced. Unlike the "feeler" and the "hearer," the seer is not directly affected by the individual perceived. In this context, seers readily assume an uninvolved, uncommitted, indifferent, literally voyeuristic stance towards one another.[87] Passive, observing individuals become more aware of themselves as autonomous "selves," while regarding their passive, observed counterparts as distinct "Others."[88]

Visual disengagement is in turn supposed to promote objectivity. The visually-distanced and disengaged seer is able to contemplate other persons or things without being burdened by the personal emotions or attitudes that might be encouraged by physical proximity. Thus, the American artist Maurice Glasser has pointed out the psychological difficulty of painting someone's portrait from within "touching distance":

86 H. Jonas, "The Nobility of Sight: A Study in the Phenomenology of the Senses", in H. Jonas, *The Phenomenon of Life* (New York: Harper & Row, 1966), 135-156, at 149-50.

87 See *supra* n.51.

88 "Critics of the Cartesian sceptical tradition have long questioned vision as the Cartesian paradigm of perception, asking if sight, by its very nature, does not presume a detachment from the Other that is then solidified into separateness from the Other." O'Fallon and Ryan, *supra* n.3, at 897.

> ... at touching distance, the sitter's personality is too strong. The influence of the model on the painter is too powerful, too disturbing to the artist's necessary detachment, touching distance not being the position of visual rendition, but of motor reaction or some physical expression of sentiment.[89]

Sight has been thought timeless because it is not dependent on the dynamic unfolding of events: unlike hearing, which depends on the next sound or phoneme to form a coherent noise or word, or touch, which depends on the next feeling to discern a shape, sight need not wait upon the next image to bring meaning. Vision can extract a tremendous amount of information from a static, literally timeless scene. Indeed, rapid change in the environment may make the visual extraction of information more difficult. Vision is therefore said to demand a certain degree of constancy or "being"; in this sense, it peculiarly "lends itself to a static conception of 'eternal truths'."[90]

Largely because we have regarded sight as timeless, we have regarded it as the principal systematizing sense. It is supposed to be the sense most capable of appreciating or identifying the constant relations between different elements that make up the very idea of "system." The visual bias of "system" was implicitly understood as early as the eighteenth century, when Scottish philosopher David Hume commented that "to deliver a system in conversation hardly appears natural."[91]

The similarity between the values of traditional American legal theory and the values we have traditionally associated with sight is not coincidental. In the first place, traditional American legal theory was developed and has prospered in a society which has itself been highly visualist. This broad cultural orientation has made American law susceptible not only to the techniques and the language of sight, but also to its phenomenological biases. In other words, with American culture dominated by a sense that is understood as fostering (if not necessarily creating) abstraction, disengagement, objectivity, timelessness and system, American legal theory — necessarily operating within that culture — has been drawn to many of the same values.

In the second place, traditional American legal theory has been

89 Quoted in E.T. Hall, *The Hidden Dimension* (Garden City, N.Y.: Doubleday, 1966), 78.

90 Keller and Grontworski, *supra* n.26, at 213.

91 Quoted in V. Cox, *The Renaissance Dialogue* (New York: Cambridge University Press, 1993), 102.

largely articulated and elaborated by individuals from American gender, racial, ethnic and religious groups whose relative visuality has arguably biased them towards the values that visuality has been held to favour. For example, the relative visuality of American men's culture may have prompted American men as a group to claim a special attraction for (and/or be pejoratively associated by many American feminists with) abstraction, disengagement, and objectivity, even if American men's visuality has neither afforded them a monopoly over the invocation or application of those values nor prevented many American men from adopting different perspectives.[92] Likewise, the relative visuality of white American culture may have encouraged white Americans (as a group) to ascribe to themselves and/or be negatively identified by many African-American intellectuals with the same norms, although white Americans' relative visuality has certainly not made those norms either their exclusive property or their universal preference.[93] The long-standing numerical and political domination of both the American legal community and the American legal professoriate by members of these and other more visualist groups has in turn helped make "visualist" standards central to traditional American legal theory.

Thirdly, traditional American legal thought has been primarily set down and spread in a visual medium — writing — the use of which may

92 For examples of feminist legal writing that implicitly or explicitly associates all or some of these norms with men or men's culture — in most instances, preliminary to the articulation of "feminist" alternatives — see C.A. MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory", *Signs* 7/3 (1982), 515-544; M.J. Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice", *New Mexico Law Review* 16/3 (1986), 613-630 at 620-21; C. Menkel-Meadow, "Portia in a Different Voice: Speculations on a Woman's Lawyering Process", *Berkeley Women's Law Journal* 1 (1985), 39-63; A.C. Scales, "The Emergence of Feminist Jurisprudence: An Essay", *Yale Law Journal* 95/7 (1986), 1373-1403.

93 For examples of African-American legal writing that implicitly or explicitly associates all or some of these norms with white American culture (for the most part, as a prelude to challenging them from a black cultural perspective), see J.O. Calmore, "Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World", *Southern California Law Review* 65/5 (1992), 2129-2230; J.M. Culp Jr., "Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy", *Virginia Law Review* 77/3 (1991), 539-590; C.R. Lawrence III, "The Word and the River: Pedagogy as Scholarship as Struggle", *Southern California Law Review* 65/5 (1992), 2231-2298.

be said to have phenomenologically encouraged law's conformity to visual values. As we have recently been reminded, "Law is bound by its form ... In important ways, it is a product of its methods of creation, transmission and execution."[94] American legal thinkers who have historically depended on writing for so much of their professional inspiration, information and communication may have been incidentally led by writing to endorse abstraction, disengagement and other such visual "norms."

The mutual affinity between vision and traditional American legal theory has arguably prompted traditional legal scholars to embrace visual metaphors. For instance, what better sense metaphorically to communicate (and reinforce) the systematic nature of law than the sense by which "systems" are said to be most readily perceived? In this context, visual legal metaphors like "seamless web" or "body of law" seem tailor-made. Likewise, what better way to communicate law's objective nature than by evoking a form of sensory experience that we have considered biased towards objectivity? In this light, referring to adjudication or appeal as "judicial review" seems highly appropriate. At the same time, the most casual use of visual legal metaphors may incidentally reinforce the phenomenologically-compatible values of orthodox jurisprudence. Saying that a constitutional principle is a "fixed star" or that an area of concurrent jurisdiction is a "zone of twilight" indirectly supports and even encourages (by virtue of the metaphors' visuality as much as their substantive content) the belief that law is abstract and disengaged from concrete human experience.

Today, of course, the traditional view of jurisprudence is under attack. Many so-called "critical scholars" argue that law should be understood as more concrete, relational, subjective, dynamic, and process-oriented. Law should be concrete in that judges and jurists should take greater account of situated context and others lived experience instead of depending upon abstract or theoretical constructs. It should be relational in that it should be more concerned with preventing and resolving differences by drawing people together in shared interaction and communal commitment instead of driving them apart. It should be subjective to the extent that law-makers and adjudicators should be more willing to recognize their own biases while making an effort to compensate

94 R.K.L. Collins and D.M. Skover, "Paratexts", *Stanford Law Review* 44/3 (1992), 509-552.

for those by empathetically adopting the points of view of the individuals who stand to be affected by their rulings. Law should be dynamic in that it should be understood not as a timeless entity, but as an event in time. By the same token, it should be understood as more of a process than a system.

It so happens that sound has long been deemed to favour most of these values. Sound is generally considered concrete because it literally reaches out to touch us; in some instances (especially at low registers), we can actually feel its presence. Sound moreover imposes its concreteness on us by immersing and surrounding us in its field. The resultant sense of intimate involvement is only heightened by the fact that although we can shut our eyes, withdraw from touch and close our mouths at will, we cannot shut our ears: in this context, sound makes us part of the real world whether we choose to be or not.[95]

Sound is also believed to establish relation, interaction and, ultimately, community: in the words of Walter Ong "sound ... tends to socialize."[96] Sound socializes because, in the first place, it is hard for anyone to ignore a sound. Sounds that we make ourselves tend to evoke responses much more successfully than most of our visible or tangible activities. In the second place, sound socializes because its communicative dependence on physical proximity draws and keeps people together. It thereby facilitates mutual involvement.[97]

Sound is deemed subjective insofar as an individual drawing close to a sound may be more likely to evaluate it in light of its source and physical context. This is especially true when the sound is speech. Spoken words are carried by a personal voice; they are mouthed by a personal presence from which they cannot be readily detached. This may encourage a certain degree of empathy. Even in extreme cases, "addressing and listening to one's enemy experientially reveals that one's enemy is truly human. This understanding counteracts the strong tendency in disputes to objectify one's enemy."[98]

95 J. Jaynes, *The Origins of Consciousness in the Breakdown of the Bicameral Mind* (Boston: Houghton Mifflin, 1976), 96.

96 W.J. Ong, *Rhetoric, Romance and Technology* (Ithaca: Cornell University Press, 1971), 28.

97 "[L]istening, unlike sight, involves a turning toward the Other. An epistemology of listening compels us towards dialogue rather than detachment." O'Fallon and Ryan, *supra* n.3, at 895-96.

98 R.J. Lipkin, "Kibitzers, Fuzzies and Apes Without Tails: Pragmatism and

Sound is also said to be dynamic. It "dances tunefully within experience"; it "embodies the sense of time."[99] A sounded musical note or a spoken word is not a fixed object, but an event. Sound moreover discloses an event: it is the product of a "doing" of some sort, be that someone walking, a river running, rain falling, or a machine working. It is a disclosure that may itself take time. In this context, a hearing-oriented world is a world necessarily focused on the ideas of "duration" and "becoming."

Because sound is and is based on an event in time, it is said to favour the idea of process rather than the idea of system. It is uniquely suited to the understanding and communication of events following one another. Literary critic Northrop Frye recognized this when he concluded that while systematic patterns of meaning were in the domain of the eye, narrative was in the domain of the ear.[100] In the context of a similar understanding, feminist philosopher of science Evelyn Fox Keller has commented that "knowledge likened to the sense of hearing ... might well lend itself to a process view of reality."[101]

Just as there are good reasons why traditional legal values and the values of vision have overlapped, there are good reasons why there is a close correspondence between critical legal values and the values of sound. First of all, critical legal theory has grown up in a more contemporary and hence more aurally-oriented cultural environment; in that situation, critical legal theory has unwittingly absorbed values and biases that sound is spreading through American culture has a whole. Second, the values of critical legal theory have come to resemble those of sound because critical legal theory has been significantly shaped by individuals coming from relatively more aurally-oriented cultural backgrounds whose aurality has arguably disposed them towards the values that aurality is generally assumed to favour. For instance, the relative aurality of American women (as a group) may be largely responsible for their traditional — if hardly exclusive or essential — association with the

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the Art of Conversation in Legal Theory", *Tulane Law Review* 66/1 (1991), 69-139 at 109.

99 D. Ihde, *Listening and Voice: A Phenomenology of Sound* (Athens: Ohio University Press, 1976), 14.

100 For a discussion of Frye's idea, see D. Chidester, *Word and Light: Seeing, Hearing and Religious Discourse* (Urbana: University of Illinois Press, 1992), 7.

101 Keller and Grontworski, *supra* n.26, at 221.

concrete and contextual, the relational, the subjective and the processual. Feminist legal scholars seeking to draw on women's lived experience have certainly played a key role in making these values an integral part of critical jurisprudence.[102] Likewise, the relative aurality of African-American culture has arguably done much to attract African-Americans to similar ideals; a number of African-American legal scholars are now incorporating these into their own brand of critical writing.[103] Third, sound has been brought directly to bear on the development of critical legal theory insofar as much of that theory has been conceived and elaborated not in writing, but in the aural argument, debate and discussion of scholarly conferences, seminars and symposia. If, indeed, the "medium is the message" (or at least part of it), critical legal theory may be said to have both literally and figuratively echoed the circumstances of its birth and development.

One major effect of the coincidence between critical legal values and the values traditionally associated with sound — however explained — has been to draw many exponents of critical legal theory to aural legal metaphors. The concrete, subjective nature of law is powerfully and provocatively captured by the evocatively-aural terms "voice" and "story." The idea of law as both relation and process is neatly and notoriously communicated by the evocatively-aural terms "listening," "dialogue" and "conversation." By choosing these and other aurally-inspired metaphors to describe and define legal phenomena, critical legal scholars have indirectly but effectively challenged the traditional legal values that have been supported by, and even rooted in, visual legal language. This aural language is arguably so potent that mere casual usage may have a "subversive" result: an innocent tendency to describe law as "talk" may, for instance, indirectly support and even encourage the notion that law is concrete, dynamic and subjective. In this sense aural legal metaphors may be profoundly counter-hegemonic.

Conclusion

Having reviewed the changing cultural, sociological and phenomenological conditions contributing to the shift away from visual and towards more aural metaphors in American legal discourse, I would like

102 See *supra* n.92.

103 See *supra* n.93.

to conclude by considering the future course of this shift. Will American legal language eventually become as dominated by aural expressions as it was in the past by visual ones?

Here, one might make several points. First, neither American culture nor American law will probably be able to sustain a complete or near-complete transition to aurally-based legal metaphors. Aural technology may have surged in the last century or so, but visual technology has hardly stood still for it. Today's society is shaped not only by the telephone, radio and tape recorder, but by the photograph, the motion picture, television and the computer. In a multimedia environment, future American culture is likely to embrace both sight and sound rather than encourage or tolerate a definitive turn from one sense towards the other. By the same token, it is not likely to generate or support a legal discourse that would consistently prefer aural over visual metaphors.

Apart from what is likely to happen, one might argue that a complete shift from visual to aural figures of speech in American legal discourse would be inadvisable, even for those persons who have thus far gained or been empowered by the increased popularity of aural legal metaphors. In the guise of liberating and validating the relatively more aural experiences of America's traditionally-marginalized gender, racial, ethnic and religious groups, such a transformation might ironically do much to legitimize and validate the circumstances of their original oppression. For instance, when feminist legal scholars embrace aural metaphors such as "dialogue" and "conversation" are they not coining a legal language in large part born of the very conditions of marginalization and oppression that they seek to challenge and change? Do their words — for all their obvious appeal — not at some level accept and endorse the sensory limitations and disabilities that others (in this instance men) have traditionally imposed on them? In this context, the true liberation of individuals from marginalized backgrounds arguably requires that they not arbitrarily limit themselves to — or pre-emptively define themselves by — aural metaphors that others have in some sense chosen for them.[104]

104 See, e.g., D. Haraway, "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective," *Feminist Studies* 14/3 (1988), 575-599 at 582: "I want a feminist writing of the body that metaphorically emphasizes vision again, because we need to reclaim that sense to find our way through all the visualizing tricks and powers of modern sciences and technologies that have transformed the objectivity debates."

A complete shift from visual to aural legal metaphors is moreover unnecessary, even to accomplish the value changes that exponents of critical legal theory may desire. Some critical scholars have arguably been too quick to reject or denigrate vision as a metaphoric model of legal expression. Perhaps, contrary to most people's assumption, sight does not have a phenomenological essence. Perhaps, instead, it embraces a multiplicity of contradictory values which are accentuated by different visual media. For instance, perhaps it is writing's long domination of our visual experience that encourages us to believe that sight abstracts, disengages, objectifies and renders the world static. After all, writing cuts us off from the physical world. Traditionally conceived, it facilitates the separation and disengagement of writer and reader; it enables the reader to assess visual information without being influenced by the presence and personality of the writer; it freezes information for convenient consolidation and storage. But what if one were to consider sight in, say, the context of gesture? Would that not emphasize the concrete, subjective, relational, and dynamic aspects of vision? If vision can subsume these values, then perhaps sight and, by implication, visual legal metaphors are potentially compatible with critical theory.

By the same token, a total embrace of aural legal metaphors might not be sufficient to the purpose of promoting critical aims. Perhaps sound too is without a phenomenological essence. Perhaps we regard sound as concrete, relational, subjective and dynamic because we still see ourselves experiencing sound in the context of face to face encounters. What would happen, however, if we began to understand sound as we are increasingly coming to experience it — i.e. as a product of technology? Relative to face-to-face conversation, technologically-based aurality can radically distance, objectify and decontextualize those who are party to it. In this context, aurality may turn out to be phenomenologically contingent.[105] Prominent aural legal metaphors such as "voice," "speaking" and "listening" (and even "dialogue" and "conversation") that now seem unequivocally positive and supportive of the critical

105 "[A]ural perception and oral expression neither presuppose nor guarantee a more 'personal' idea or use of knowledge. That the spoken word ... lends itself less easily to apersonal forms of fixation and transmission than images or print, can no longer be taken as a truism. New techniques available to record (and process) spoken language ... make the old divisions harder to maintain ...". J. Fabian, *Time and the Other: How Anthropology Makes its Object* (New York: Columbia University Press, 1983), 119.

agenda may prove capable of evoking ambivalent or even negative values which would be fatal to their critical purpose. Arbitrarily limiting oneself to aural figures of legal speech would therefore seem as inadvisable as rejecting visual legal metaphors out of hand.

It therefore seems that into the foreseeable future, American legal discourse will — and probably should — embrace metaphors evoking sight as well as metaphors evoking sound. While we listen with new attention to the "voice" and "conversation" of the law, we can continue to "observe" and "review" it. By indulging the metaphoric language of both aurality and visuality, we can not only compensate for the cultural, sociological and phenomenological limitations of any one scheme of representation, but we can actively indulge two fundamental and complementary aspects of our own humanity. In the long run, such an inclusive and potentially-synergistic reconfiguration of American legal discourse may do much to ensure that, in a new age, American law remains figuratively and literally sensible.